LOOKING BEYOND *BATSON*: A DIFFERENT METHOD OF COMBATING BIAS AGAINST QUEER JURORS

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INTRODUCTION

On November 27, 1978, Harvey Milk, the first openly gay elected official in California's history, was murdered.[1] He was shot five times, twice in the head.[2] His murderer, Dan White, was convicted of voluntary manslaughter and served only five years in prison.[3]

The Dan White trial is the most famous example of queer juror exclusion in American history.[4] While White's defense attorney, Douglas Schmidt, could not directly ask the jurors about their sexual orientation, he had another strategy: find the gays and allies and keep them out, and find the Catholics and keep them in.[5] Schmidt struck a woman who admitted to walking with some of her friends at a gay pride parade; he kept a retired police officer.[6] He struck a young man who said he lived with a male roommate; he kept the churchgoers.[7] He asked everyone: "Have you ever supported controversial causes, like homosexual rights, for instance?"[8] By the end of the jury selection process, the jury was entirely white and heterosexual.[9] And by the end of the trial, Dan White, who lured Harvey Milk into an empty room and shot him twice in the skull, was only convicted of voluntary manslaughter and served a fraction of the time he would have received for a murder conviction.[10] After he was convicted, in a night of protests that became known as the White Night Riots, crowds took to the street chanting,

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1. RANDY SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK xvi, 269 (1982).

2. *See id.* at 269.

3. Jay Mathews, *Dan White Commits Suicide*, WASH. POST (Oct. 22, 1985), https://www.washingtonpost.com/archive/politics/1985/10/22/dan-white-commits-suicide/590322ca-f461-4a98-9c5f-348648f7ac66/ [https://perma.cc/Q7YQ-R6NW].

4. Andy Birkey, *Discrimination Against LGBT Jurors Remains Legal*, HUFFPOST (May 1, 2012, 8:18 AM), https://www.huffpost.com/entry/lgbt-discrimination-jurors_n_1466364.html [https://perma.cc/R6J6-7PDR] (discussing juror dismissal based on sexual orientation in Dan White's trial).

5. *See* SHILTS, *supra* note 1, at 308-10.

6. *Id.* at 308-09.

7. *Id.* at 308.

8. *Id.* (emphasis omitted).

9. *See id.* at 309.

10. *Id.* at 269, 325.

"All-straight jury. No surprise. Dan White lives. And Harvey Milk dies."[11]

The nation's queer[12] advocates were stunned.[13] There was a sense that "few judges in America would allow black jurors to be systematically excluded from a jury weighing the murder of the nation's most prominent black public official."[14] At the time, of course, there were no such protections for black jurors.[15] Those protections would not properly arise until 1986 with *Batson v. Kentucky*,[16] and even then, the protections would apply only to racial (and later, gender[17]) classifications. No court would consider protecting queer jurors from peremptory strikes until 2014.[18]

In the past twenty years, scholars have started calling for an expansion of the *Batson* rule to protect queer jurors.[19] In 2014, the Ninth Circuit became the first to rule that *Batson* applied in cases of discrimination based on sexual orientation.[20] It based its decision partially on the contemporaneous *United States v. Windsor* ruling, where the Supreme Court affirmed a Second Circuit decision that relied on the understanding that classifications based on sexual orientation were subject to heightened scrutiny.[21] But while an

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11. Birkey, *supra* note 4.

12. Queer is being used throughout this Note as an umbrella term that encompasses a wide variety of sexual orientations and gender identities.

13. *See, e.g.*, SHILTS, *supra* note 1, at 325-26 (detailing the visceral reaction of one queer advocate upon hearing the jury's verdict).

14. *Id.* at 308.

15. *See* Birkey, *supra* note 4.

16. 476 U.S. 79, 100 (1986).

17. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 141-42 (1994).

18. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 476 (9th Cir. 2014).

19. *See, e.g.*, Vanessa H. Eisemann, *Striking a Balance of Fairness: Sexual Orientation and Voir Dire*, 13 YALE J.L. & FEMINISM 1, 26-27 (2001); Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 HARV. J.L. & GENDER 407, 409 (2014); Julia C. Maddera, Note, Batson *in Transition: Prohibiting Peremptory Challenges on the Basis of Gender Identity or Expression*, 116 COLUM. L. REV. 195, 197 (2016). *But see* Kathryne M. Young, *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, 48 WILLAMETTE L. REV. 243, 243-46 (2011) (exploring the consequences of applying *Batson* to sexual orientation).

20. *SmithKline*, 740 F.3d at 475-76. The court specifically referred to "gays and lesbians" in the opinion, thus leaving open the question of the ruling's application to strikes based on gender identity. *See id.* at 484.

21. *See id.* at 481-83. The scrutiny standard for sexual orientation and gender identity classifications is still unclear. *Id.* at 480 ("*Windsor*, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case."). For a detailed

expansion of the *Batson* rule is both consistent with Supreme Court precedent[22] and necessary,[23] it is not the only available solution to the problem of bias against queer jurors, nor is it necessarily the best one.[24] This Note calls for a different solution—a rule that goes beyond *Batson* and addresses both explicit and implicit bias, as well as discriminatory motives obscured by facially neutral excuses.

Part I examines the constitutional and historical basis of the peremptory challenge, the history of exclusion of protected classes from the jury box, and the ruling, reasoning, and practical consequences of *Batson*. Part II examines *Batson*'s shortcomings, first looking at evidence of its failure to address racial disparities in juries, then at the issue of less visible class distinctions such as sexuality and gender identity and how those identities complicate the problem of implicit bias and stereotyping. Part III examines Washington's newly implemented General Rule 37, which goes beyond the *Batson* rule and limits peremptory strikes based on both explicit and implicit bias, and attempts to ferret out impermissibly discriminatory motives. Part III then explains how such a standard could more effectively govern the discriminatory striking of queer jurors at a national level. Part IV acknowledges the shortcomings of a legislative approach to reforming the peremptory challenge rule and addresses the potential dangers of so limiting the rule.

I. A HISTORY OF UNEQUAL ACCESS TO THE JURY BOX

For most of American history, Americans were not judged by a jury of their peers.[25] At first, various openly discriminatory laws kept women and people of color out of the juror pool entirely.[26] But

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analysis of the *Windsor* decision and the need for a clarified scrutiny standard for sexual orientation and gender identity classifications, see generally Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J.L. & PUB. POL'Y 493 (2015).

22. *SmithKline*, 740 F.3d at 476 (applying *Batson* to striking the only gay juror).

23. For an examination of the consequences of removing members of vulnerable groups from juries, see *infra* Part I.C.

24. *See generally* Young, *supra* note 19.

25. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 827-30 (1997), for a detailed account of the peremptory challenge's history in the United States and its origins in English law.

26. *See id.* at 828, 834 n.137.

once the Court ruled such laws unconstitutional, lawyers and legislators used other strategies—dishonest voir dire practices, costs associated with jury participation,[27] and explicit training in racist and sexist jury selection—that all resulted in less diverse juries.[28] Abuse of the peremptory challenge is one such strategy.[29]

A. The Controversy Surrounding the Peremptory Challenge

Though specific rules vary by jurisdiction, generally attorneys have two tools during jury selection: strikes for cause and peremptory strikes.[30] Strikes for cause apply in cases of obvious bias, like if a juror is related to a party or has some financial interest in the litigation.[31] Peremptory strikes are where *Batson* kicks in. Each party gets a certain number of strikes that can be used for any reason without stating a cause—unless, the Court in *Batson* held, that cause is racial (or later, gender) bias.[32]

Scholars have been predicting the death of the peremptory challenge for decades.[33] Critics believe that the peremptory challenge is an insult to the democratic ideals of the country;[34] skeptics believe

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27. Hanna Kozlowska, *Jury Duty Is Still an Expensive Waste of Time, Even Though US Courts Know How to Fix It*, QUARTZ (Apr. 10, 2017), https://qz.com/950121/jury-duty-is-still-an-expensive-waste-of-time-even-though-us-courts-know-how-to-fix-it [https://perma.cc/X5RG-H6VD].

28. For an example of the training methods used to encourage prosecutors to avoid selecting black jurors, see *McMahon Philadelphia DA Training Video (excerpts)*, YOUTUBE (Nov. 7, 2007), https://www.youtube.com/watch?v=rv9SJPa_dF8 [https://perma.cc/9YSU-ENB2] [hereinafter *Training Video*].

29. *See* Hoffman, *supra* note 25, at 846-49.

30. *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect [https://perma.cc/9LN9-KH9Z].

31. *Id.* There is currently debate over whether a party should be able to strike jurors who demonstrate antiqueer bias for cause. *See, e.g.*, Shay, *supra* note 19, at 414.

32. *How Courts Work*, *supra* note 30.

33. *See, e.g.*, Mark Curriden, *The Death of the Peremptory Challenge,* 80 A.B.A. J. 62, 62 (1994); *see also* Michael A. Cressler, Comment, Powers v. Ohio*: The Death Knell for the Peremptory Challenge?*, 28 IDAHO L. REV. 349, 350 (1992) ("[T]he potential for equal protection claims against the exercise of peremptory challenges becomes incalculable."); Christopher M. Ferdico, Note, *The Death of the Peremptory Challenge:* J.E.B. v. Alabama, 28 CREIGHTON L. REV. 1177, 1179 (1995) ("[T]he peremptory challenge has been eroded into nonexistence.").

34. *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend,* 92 WASH. U. L. REV. 1503, 1510 (2015).

that peremptory challenges are ineffective in ensuring a fair trial;[35] cynics argue that the peremptory challenge still exists only because of its perceived deep historical roots.[36] However, many scholars and practicing attorneys argue that the peremptory challenge is not only important because of its roots in the history of the jury, but because it allows counsel to protect against biases that jurors will not admit to during voir dire, or might not even be aware of themselves.[37] It also allows attorneys to have a more active role in juror selection. If only strikes for cause existed, the judge would be in complete control of the makeup of the jury.

The Supreme Court has both pleased and enraged those on either side of the debate. It has held that "the Constitution does not guarantee a right to peremptory challenges"[38] and that mistaken denial of a peremptory strike is not per se reversible error under federal law or the Constitution.[39] But the Court has also noted the long history of peremptory strikes, including an eloquent and lengthy tribute in *Swain v. Alabama*, the precursor to *Batson*.[40] In fact, when *Batson* was announced, Chief Justice Warren Burger was so displeased by the majority's failure to fully articulate the grand legacy of the peremptory challenge that he took it upon himself to do so.[41] He quoted large sections of *Swain* and concluded that, if the Court had bothered to consider the State's interest in maintaining the benefits of the peremptory rule, those benefits might very well outweigh the equal protection challenge.[42]

Regardless of these ongoing fights over the value of the peremptory rule generally, it is undeniable that the rule has grappled with the Equal Protection Clause for centuries.[43] Until the Reconstruction Era, lawyers rarely had to rely on the peremptory challenge to

35. *See id.* at 1526-27.

36. *See* Hoffman, *supra* note 25, at 812-13.

37. Roberts, *supra* note 34, at 1527-28.

38. Batson v. Kentucky, 476 U.S. 79, 98 (1986).

39. Rivera v. Illinois, 556 U.S. 148, 160 (2009) ("To hold that a one-time, good-faith misapplication of *Batson* violates due process would likely discourage trial courts and prosecutors from policing a criminal defendant's discriminatory use of peremptory challenges. The Fourteenth Amendment does not compel such a tradeoff.").

40. 380 U.S. 202, 212-20 (1965).

41. *See* 476 U.S. at 112-34 (Burger, C.J., dissenting).

42. *Id.* at 119-25.

43. *Swain*, 380 U.S. at 205-07; *see also* Hoffman, *supra* note 25, at 827.

exclude minority racial groups because the legal system simply excluded them at the front end.[44] But as the federal government slowly brought an end to de jure segregation and more black potential jurors ended up in the venire, litigators began using peremptory strikes as a way to keep them off of juries.[45] This led to a series of Supreme Court cases addressing, essentially, the de facto exclusion of black jurors, all of which culminated in the current law: the *Batson* challenge.[46]

B. Batson *and Its Progeny*

The facts of *Batson* are straightforward: an all-white jury convicted James Batson, a black man, of burglary, and on appeal, Batson challenged the prosecutor's jury selection process.[47] Before trial, the prosecutor had used his peremptory strikes to strike all four of the black potential jurors.[48] The lower court, relying on *Swain*, held that Batson had not shown that the prosecution's jury selection process was generally racist across all its cases, only that it might have been in this particular case.[49] The Supreme Court reversed, and the new and highly controversial *Batson* standard was born.[50]

Batson did two things: (1) it lowered the burden of proof so that a defendant only needs to make a showing that the jury selection was race-based in the defendant's own case, rather than systematically across the jurisdiction;[51] and (2) it established the test for whether a peremptory challenge must be denied.[52] A *Batson* challenge works like this: after one party makes a peremptory strike, the other side objects, claiming racial bias.[53] The striking party then must offer a neutral reason for the strike.[54] Importantly, the reason

44. Hoffman, *supra* note 25, at 827-30.
45. *Id.*
46. *See Batson*, 476 U.S. at 98-99.
47. *Id.* at 82-83.
48. *Id.* at 83.
49. *See id.* at 83-84.
50. *Id.* at 84.
51. *Id.* at 90-96.
52. *Id.* at 96-97.
53. *Id.* at 96.
54. *Id.* at 97.

given by the striking party does not have to be, to use the Court's own word, "plausible"; it just needs to be neutral.[55] The objecting party then has an opportunity to try to prove that the strike was in fact racially motivated.[56]

Since *Batson*, the Supreme Court has expanded the ruling several times. It has held that *Batson* applies regardless of the race of the defendant,[57] that it applies to civil as well as criminal cases,[58] and that lawyers can raise *Batson* challenges with strikes based on gender as well as race.[59] These cases prove an important point about the nature of the rights that *Batson* protects: not just the right of the defendant to have a jury of her peers, but the right of the juror to serve.[60] And it certainly seems that the Court was aware even at the time of writing *Batson* that the decision went beyond the rights of the defendant.[61] In its decision, the Court noted that discriminatory jury selection harms more than the defendant in a criminal case, and in fact affects "the entire community" and "undermine[s] public confidence in the fairness of our system of justice."[62] All this to say *Batson* is not just about criminal defendants getting a fair trial under the Sixth Amendment. It is about the Fourteenth Amendment's equal protection provisions as well.

J.E.B. v. Alabama, the case where the Court extended *Batson* to gender, provides further insights about the Court's purpose in *Batson*.[63] Writing for the majority, Justice Harry Blackmun recognized the history of gender discrimination in the United States and rejected the State's argument that attorneys could assume that women as a group would be more inclined toward emotional decision-making.[64] In a refrain familiar from Justice Blackmun's other equal protection cases, he denounced the use of "stereotypes" that were once used to keep women from the public sphere

55. Purkett v. Elem, 514 U.S. 765, 768 (1995).
56. *Batson*, 476 U.S. at 96. This is, to say the least, difficult to prove. *See infra* Part II.A.
57. Powers v. Ohio, 499 U.S. 400, 416 (1991).
58. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630 (1991).
59. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).
60. *Batson*, 476 U.S. at 87.
61. *See id.*
62. *Id.*
63. *See, e.g.*, *J.E.B.*, 511 U.S. at 145-46.
64. *See id.* at 138-39.

entirely.[65] In this way, the *Batson* line of cases serves as both an acknowledgement of the history of discrimination against certain classes of jurors and recognition of the public distrust that juror discrimination can cause. It is with this in mind that many scholars have called for expanding *Batson* to sexual orientation and gender identity.[66]

C. The Case for Extending Batson *to Protect Queer Jurors*

In ruling that *Batson* applied in cases with queer jurors, the Ninth Circuit considered the history of queer discrimination in America.[67] While acknowledging that no laws explicitly banning queer people from juries have existed, it noted that "[b]eing 'out' ... is ... a relatively recent phenomenon,"[68] and so the circumstances are different than those considered in cases of racial bias.[69] The court noted in its decision that the number of Americans who personally knew someone who is gay rose from 25 percent in 1985 to 75 percent in 2000.[70] By 2016, that number jumped to 87 percent.[71] More people are out, so more people will be open about their identities in public settings like courtrooms; the problem of bias against queer jurors is both new and growing.

A nationally mandated extension of *Batson* hinges on the Supreme Court holding that queer people are a protected class subject to heightened scrutiny—an argument that has been made

65. *See id.*

66. *See supra* note 19 and accompanying text.

67. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 485-86 (9th Cir. 2014).

68. *Id.* at 485. Up until 2003, being out could result in grave legal consequences, including incarceration. *See* Lawrence v. Texas, 539 U.S. 558, 564, 578 (2003). Even though many sodomy laws in the United States were rarely prosecuted in the years leading up to *Lawrence v. Texas*, outing oneself to law enforcement, fellow jurors, or attorneys was significantly harder in an era with those laws technically still on the books. *See, e.g.*, *id.* at 573. This stigma was essential in the holding of *Lawrence*. *See id.* at 575. Now, jurors must still worry about employment discrimination and even physical harm when deciding whether to be openly out. *See* Young, *supra* note 19, at 258.

69. *SmithKline*, 740 F.3d at 485. The issue is somewhat (though not entirely) more analogous to gender strikes—at the time of *J.E.B.*, the presence of women on juries was relatively recent. *See J.E.B.*, 511 U.S. at 131-32.

70. *SmithKline*, 740 F.3d at 485-86.

71. *Where the Public Stands on Religious Liberty vs. Nondiscrimination,* PEW RES. CTR. (Sept. 28, 2016), http://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/ [https://perma.cc/5V9S-3CY3].

repeatedly and in far more detail than this Note calls for.[72] Absent that standard, however, the legal exclusion of queer jurors could have serious consequences. In a 1972 case, Justice Thurgood Marshall noted that "[w]hen any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[73] He was right: diverse juries make better decisions. One study showed what a striking difference having even one black juror introduced to an all-white jury could make.[74] While all-white juries convicted black defendants 81 percent of the time and white defendants 66 percent of the time, juries with at least one black juror convicted black and white defendants at nearly identical rates (71 percent and 73 percent respectively).[75]

Though there is no existing parallel study of juries involving queer jurors, other research points to the need for a queer perspective in the jury box. Some examples: queer people are more likely to be incarcerated and more likely to receive the death penalty;[76] prosecutors are able to secure higher penalties, up to and including the death penalty, for queer women who are perceived as more masculine;[77] juries perceive queer rape victims as somehow more culpable, less sympathetic, or less believable than cisgender-heterosexual victims;[78] and, disturbingly, the gay panic defense is still used in many jurisdictions.[79] These instances of bias against

72. *See, e.g.*, Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1579 (2017); Sobel, *supra* note 21, at 499; James Lobo, Comment, *Behind the Venire: Rationale, Rewards and Ramifications of Heightened Scrutiny and the Ninth Circuit's Extension of Equal Protection to Gays and Lesbians During Jury Selection in* SmithKline v. Abbott, 56 B.C. L. REV. E-SUPPLEMENT 106, 122 (2015).

73. Peters v. Kiff, 407 U.S. 493, 503 (1972).

74. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials,* 127 Q.J. ECON. 1017, 1019 (2012).

75. *Id.*

76. Michael B. Shortnacy, Comment, *Guilty and Gay, A Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 AM. U. L. REV. 309, 316-17, 332, 350 (2001).

77. *See id.*

78. Anna Wakelin & Karen M. Long, *Effects of Victim Gender and Sexuality on Attributions of Blame to Rape Victims*, 49 SEX ROLES 477, 477-85 (2003).

79. The gay panic defense relies on juror homophobia as its base premise. It is a strategy used most often in murder or assault cases where the defense attempts to establish the sexuality of the victim as a mitigating factor or justification for the defendant's violence. *See*

queer defendants, witnesses, and victims would presumably be reduced by the presence of queer jurors in the box.[80] Unfortunately, expanding *Batson* might not be enough to reduce instances of queer juror exclusion.

II. *BATSON*'S SHORTCOMINGS

When James Batson was sitting through the beginning stages of his trial, he noticed right away that the prosecutor was striking every black juror.[81] He demanded his attorney object, and the attorney replied that he could not object—the prosecutor had done nothing wrong.[82] And when Batson finally convinced his attorney to object anyway, the judge and the two lawyers had a conversation that perfectly explains the state of the law at the time.[83] The defense counsel objected, the two lawyers made their way up to the bench, and the defense counsel asked that the prosecutor explain his strikes.[84] Before the prosecutor could say a word, the judge interrupted and said what was true of every peremptory strike at the time: the prosecutor did not have to explain himself.[85] It did not matter that the jury was now entirely white.[86] This was the law.

Introduction of the Gay and Trans Panic Defense Prohibition Act of 2018, NAT'L LGBT B. ASS'N (July 13, 2018), https://mailchi.mp/lgbtbar/gay-and-trans-panic-defense-prohibition-act-of-2018 [https://perma.cc/G33B-WPYD].

80. Keeping in mind, of course, that "queer" here is being used as an umbrella term for a reason; the queer community contains a wide variety of identities, and not all of those in the community would necessarily act as advocates for those who identify with the other letters in the LGBTQIA acronym. Transphobia, biphobia, and other intracommunity biases certainly exist, but members of the community are also more likely to have positive attitudes toward others who identify outside of the cisgender-heterosexual norm. Tiffani "Tie" S. Wang-Jones et al., *Comparing Implicit and Explicit Attitudes of Gay, Straight, and Non-Monosexual Groups Toward Transmen and Transwomen*, 19 INT'L J. TRANSGENDERISM 95, 95, 101, 103 (2018).

81. Sean Rameswaram, *More Perfect: Object Anyway,* N.Y. PUB. RADIO 12:10-12:23 (July 16, 2016), https://www.wnycstudios.org/podcasts/radiolabmoreperfect/episodes/object-anyway [https://perma.cc/BF9H-YGQH].

82. *Id.*

83. *See id.* at 13:00.

84. *Id.*

85. *Id.*

86. *See id.*

Batson makes illegal the openly discriminatory actions its namesake felt instinctively should not be allowed.[87] For the first time, the Court demanded a reason from lawyers invoking the age-old peremptory challenge, and if that reason was race alone, the strike could not stand.[88] That was revolutionary; it was also not enough.

There is no shortage of criticisms of *Batson* from both sides of the peremptory challenge debate. Those who wish to abolish peremptory challenges say that *Batson* does not go far enough, while those in favor of peremptory challenges say that *Batson* undercuts one of the most powerful tools at a lawyer's disposal.[89] *Batson* undeniably presents challenges in its practical application. For one, "[t]he *Batson* test requires acts that its critics identify as very difficult: for the lawyer, asserting that a colleague at the bar has engaged in purposeful discrimination; for the judge, detecting and declaring purposeful discrimination."[90] And that is just a problem inherent with confronting explicit bias. Implicit biases—internalized prejudices that the biased person is unaware of—fall entirely outside the scope of *Batson*.[91] The major criticism of *Batson*, however, rests on how easy it is to circumvent.

A. The "Neutral Reason" Test

As noted above, each step of the *Batson* challenge presents unique issues. Asserting that a colleague is engaging in racist voir dire practices could understandably lead to strained working relationships between two attorneys, or between attorneys and judges. But lawyers are trained (and paid) to navigate social conflict. The true issue with *Batson* lies in its second step, wherein the striking party provides a race-neutral reason for the strike.

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87. *Id.*; *see also supra* Part I.B.

88. *See supra* Part I.B.

89. *See* Maddera, *supra* note 19, at 201-02.

90. Roberts, *supra* note 34, at 1511 (internal citations omitted). This point also brings to mind Justice Marshall's concurring opinion in *Batson*, where he expressed doubt that judges would be willing to examine their own prejudices to properly enforce the rule. *See infra* notes 95-97 and accompanying text.

91. *See* Batson v. Kentucky, 476 U.S. 79, 98 (1986) (instructing trial courts "to determine if the defendant has established *purposeful* discrimination" (emphasis added)).

1. Explicit Bias and Pretense

In analyzing the neutral reason test, Morris Hoffman, a former trial judge in favor of abolishing the peremptory rule, noted that "at some point a sufficiently narrowed 'race-neutral' explanation can, in fact, be a cover for race discrimination."[92] Another critic said, more bluntly, "This is where ingenuity comes in. 'Any lawyer worth his or her salt can come up with a race neutral reason for the strike.'"[93]

Peremptory strikes, by definition, can be based on anything that is not a constitutionally impermissible bias. Reasons for strikes can vary wildly: a lack of eye contact, a hostile or disinterested demeanor, or even, "the mustaches and the beards look[ed] suspicious to me,"[94] are all considered sufficiently race-neutral reasons. The text of *Batson* does not require a judge to confirm that a juror was, in fact, hostile to the striking party. Under *Batson*, if the reason is race-neutral (though implausible), the strike stands. So even in the easiest cases where lawyers are consciously aware of their race-based motivations, the neutral reason test provides easy cover. A lie, even a bad one, is enough for lawyers who are intentionally angling to remove jurors of a certain race to survive a *Batson* challenge. But the issue gets even more complicated when a lawyer makes a race-based strike because of an internalized bias that they themselves are unaware of.

2. Implicit Bias and Good Intentions

Prejudice does not always take the form of overt racism or conscious stereotyping. In his concurrence in *Batson*, Justice Marshall agreed "wholeheartedly" with the premise that some prosecutors used the peremptory challenge to eliminate black jurors in violation of the Equal Protection Clause, and lauded the Court for taking "a historic step toward eliminating the shameful practice of racial

92. *See* Hoffman, *supra* note 25, at 836-37 (quoting Purkett v. Elem, 514 U.S. 765, 775 (1995) (Stevens, J., dissenting)).

93. Curriden, *supra* note 33, at 62.

94. Purkett v. Elem, 514 U.S. 765, 766 (1995).

discrimination in the selection of juries."[95] However, lines later, he worried that *Batson* would do little to eliminate less-obvious prejudice from the courtroom: the "unconscious racism" that would drive judges to accept "neutral reasons" clearly driven by racial stereotypes.[96] To do otherwise, he said, would require all court actors "to confront and overcome their own racism," a tall order for even the most well-intentioned lawyer.[97] In saying so, Justice Marshall predicted the *Batson* rule's future struggle with implicit bias.

Harvard's "Project Implicit" has tested over two million individuals for unconscious biases based on factors such as race, gender, sexuality, weight, and disability, using Implicit Association Tests (IATs).[98] The results of the race IAT show that average white Americans in every single state are moderately to highly biased against African Americans.[99] Those results are skewed by the fact that the test is voluntary and self-selecting—the only people taking the test are those who specifically seek it out and want to study their own biases.[100] This means that the test-takers tend to be younger, more liberal, and more highly educated than the average American, and those not included in the Project Implicit sample may actually be even more biased.[101]

Implicit bias is especially problematic in the context of *Batson* because establishing a violation based on an attorney's unconscious prejudice is nearly impossible. If finding racist motivations under

95. *Batson*, 476 U.S. at 102, 105 (Marshall, J., concurring).

96. *Id.* at 106.

97. *Id.*

98. Chris Mooney, *Across America, Whites Are Biased and They Don't Even Know It*, WASH. POST (Dec. 4, 2014, 12:40 PM), https://www.washingtonpost.com/news/wonk/wp/2014/12/08/across-america-whites-are-biased-and-they-dont-even-know-it/ [https://perma.cc/C4LK-J3CK]; *About Us*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/aboutus.html [https://perma.cc/46BH-BMGH].

99. Mooney, *supra* note 98. Project Implicit's IATs look for associations between faces and words or concepts. For example, test-takers might first be asked to assign black faces and "good" words to the left side of the screen and white faces and "bad" words to the right side of the screen. The IAT then measures the time it takes, in milliseconds, for the test-taker to sort the images correctly, then switches the pairing (black faces with "bad" and white with "good") and compares the times and amount of mistakes made. The disparity gives the overall score; any number over 0 indicates a preference for white faces while any number under 0 indicates a preference for black faces. The average score nationwide is .402, which falls into the category of "strongly prefers whites." *Id.*; *see also* PROJECT IMPLICIT, *supra* note 98.

100. Mooney, *supra* note 98.

101. *Id.*

the neutral reason test is hard when attorneys are deliberately concealing their motives, it becomes much harder when attorneys genuinely believe that their strikes are motivated by intuition rather than implicit bias.

3. The End Results

A 1996 study that sampled every case involving a *Batson* challenge from 1986 to 1993 painted a grim picture of *Batson*'s effects: only 17 percent of the objections succeeded.[102] The Washington Supreme Court came to a similarly disappointing result when reviewing their state's application of *Batson*.[103] In a case preceding the adoption of Washington's General Rule 37, discussed below, the majority wrote a scathing critique of the way jury selection worked in their state, even following *Batson*.[104] Quoting Justice Stephen Breyer,[105] the Washington Supreme Court referred to studies that showed, among other troubling statistics, "race-based uses of prosecutorial peremptories declined by only 2% after *Batson*"; that "*Batson* challenges' success rates [were] lower where peremptories were used to strike black, rather than white, potential jurors"; and "that few *Batson* challenges succeed."[106] Narrowing their focus to Washington, the court went on to say, "In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court's erroneous denial of a *Batson* challenge."[107] In the end, they concluded, "[I]t is evident that *Batson*, like *Swain* before it, is failing us."[108]

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102. Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 459 (1996).

103. State v. Saintcalle, 309 P.3d 326, 334 (Wash. 2013).

104. *Id.* at 334-35.

105. Justice Breyer, concurring in a 2005 case, expressed deep concerns about the usefulness of *Batson* and the ability of lawyers to easily circumvent the neutral reason rule. *See* Miller-El v. Dretke, 545 U.S. 231, 266-72 (2005) (Breyer, J., concurring).

106. *Saintcalle*, 309 P.3d at 334 (internal citations omitted).

107. *Id.* at 335.

108. *Id.* at 334.

B. Invisible Identities and Identifying Bias

The neutral reason rule has issues even in gender and racial applications. But when it comes to queer identities, the problems get even more complex. In *SmithKline*, when the trial judge decided to disallow a *Batson* challenge to a peremptory strike on a gay juror, he relied on three factors. First, the trial judge assumed that *Batson* did not apply to queer jurors, a position the Ninth Circuit later rejected.[109] Second, he believed (incorrectly) that *Batson* did not apply to civil cases.[110] Third—the point most relevant to this Note—he pointed out that sexuality is not a visible trait.[111] How could he know that the striking attorney really relied on the juror's sexuality, when it was possible that the attorney did not know the man was gay?[112]

The underlying case behind the Ninth Circuit's decision arose out of a contract dispute between two drug companies, Abbott and GSK, regarding pricing of a drug used in treating HIV/AIDS.[113] During voir dire, one juror mentioned that he had a male partner.[114] Abbott moved to strike the juror.[115] In this case, the striking attorney agreed to rest on the trial judge's three given reasons, essentially admitting to striking the juror due to his sexuality.[116]

But what if the attorney's reasoning had been that the juror had just *seemed* like he would be biased in a case involving HIV/AIDS? Such an assumption would be facially neutral, even if *Batson* had applied to sexuality in the Ninth Circuit at the time. It does not matter that the lawyer would not have anything to base that assumption on: remember, neutral reasons do not need to be plausible.[117]

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109. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 475 (9th Cir. 2014) (citing the trial transcript).

110. *Id.*

111. *Id.*

112. *See id.* Said attorney, of course, agreed with the judge, stating that he had "no idea" if the juror was gay or not, despite the juror's earlier mention of a male partner in voir dire. *Id.*

113. *Id.* at 474.

114. *Id.* at 475.

115. *Id.*

116. *Id.*

117. *See supra* notes 51-56 and accompanying text.

In other words, queer people have—and are assumed to have—experiences that cisgender-heterosexual people do not. Some examples: poor experiences during early education such as harsher treatment by school administrators, bullying from peers, and strict dress codes that do not allow for gender expression, which can all lead to behavior that increases the likelihood of criminal activity later in life.[118] Accordingly, out queer children make up approximately 7 to 8 percent of the nation's population, but approximately 13 to 15 percent of the juvenile justice system.[119] Queer people are also more likely to end up homeless and more likely to experience poverty than cisgender-heterosexual people,[120] and poverty and homelessness have long been associated with increased levels of incarceration.[121] They are also situated against authority early on; even youth growing up in a post-*Obergefell* era recognize the history of state-sponsored discrimination against their queer predecessors, and can be wary of law enforcement as a result.[122] Trans people, particularly trans women of color, are profiled as sex workers by police and are more likely to be arrested.[123] Famously, queer people

118. SARAH E. REDFIELD & JASON P. NANCE, ABA, SCHOOL-TO-PRISON PIPELINE: PRELIMINARY REPORT 24, 41 (2016), https://www.ncbar.org/media/708831/school-to-prison-pipeline-preliminary-report-complete-final.pdf [https://perma.cc/YC8W-MU2G].

119. SHANNAN WILBER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH IN THE JUVENILE JUSTICE SYSTEM, JUVENILE DETENTION ALTERNATIVES INITIATIVE 11 (2015), http://www.njjn.org/uploads/digital-library/AECF_LGBTinJJS_FINAL_Sept-2015.pdf [https://perma.cc/TC7X-KRCV]; Angela Irvine, *"We've Had Three of Them": Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System,* 19 COLUM. J. GENDER & L. 675, 676-77 (2010).

120. Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community* (Cal. Ctr. Population Research, Working Paper No. CCPR-2009-007, 2009), http://papers.ccpr.ucla.edu/index.php/pwp/article/view/ CCPR-2009-007 [https://perma.cc/HE3K-D5W9].

121. For a discussion of the connection between poverty and crime and the invisible crimes of the rich, see generally JEFFREY REIMAN & PAUL LEIGHTON, THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, AND CRIMINAL JUSTICE (11th ed. 2017).

122. *See generally* Erica L. Ciszek, Identity, Culture, and Articulation: A Critical-Cultural Analysis of Strategic LGBT Advocacy Outreach (June 2014) (unpublished Ph.D. dissertation, University of Oregon), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18364/Ciszek_oregon_0171A_10974.pdf [https://perma.cc/4VY8-8ZRP].

123. CATHERINE HANSSENS ET AL., A ROADMAP FOR CHANGE: FEDERAL POLICY RECOMMENDATIONS FOR ADDRESSING THE CRIMINALIZATION OF LGBT PEOPLE AND PEOPLE LIVING WITH HIV 5 (2014), https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/roadmap_for_change_full_report.pdf [https://perma.cc/RRG4-XBCV].

often have negative associations with religion;[124] less famously, people on the queer spectrum, especially trans people, often have negative experiences with healthcare.[125]

These studies show the experiences of many—but not all—queer people. But, in a world obsessed with demographics, attorneys may choose to rely on these statistics as shortcuts during voir dire. So, should an attorney be able to ask questions about a trans woman's interactions with the police when the other jurors were not questioned? Should that attorney be able to ask about a gay juror's experience or lack thereof with homelessness? With doctors? With religion?[126]

Assume that one day the Supreme Court holds, as the Ninth Circuit did, that *Batson* applies in cases of discrimination against queer jurors. How would that be implemented? In her article *Outing* Batson*: How the Case of Gay Jurors Reveals the Shortcomings of Modern Voir Dire*, Kathryne Young outlines the practical problems with applying *Batson* to queer jurors, each of which will be addressed below.[127]

The first issue is the problem of identification. *Batson* challenges are currently uncomplicated at this step; a party strikes a juror, and the opposing side objects, saying something along the lines of, "That juror is black, and you struck her because she is black." But in cases of sexuality or gender identity, the juror in question might never explicitly reveal her sexuality. In fact, the identification of queer jurors on sight might rely on the very stereotypes that Justice Blackmun warned against in *J.E.B.*[128] A jury member's manner of

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124. *See* Mary Becker, *Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better than One*, 2001 U. ILL. L. REV. 1, 8-31 (tracing the religious roots of the movement against same-sex marriage).

125. *See* Laura E. Durso & Ilan H. Meyer, *Patterns and Predictors of Disclosure of Sexual Orientation to Healthcare Providers Among Lesbians, Gay Men, and Bisexuals*, 10 SEXUALITY RES. & SOC. POL'Y 35, 36 (2013) (explaining that, while most patients would prefer to disclose their sexuality or gender identity to their physicians, many are reluctant to do so).

126. Washington has identified the same problem regarding questions posed to people of color and not white people during voir dire; for further discussion of this issue, see *infra* Part III.A.

127. *See generally* Young, *supra* note 19.

128. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").

dress may be a perfectly acceptable neutral reason for a peremptory challenge under *Batson*.[129] For queer people, manner of dress could be a large part of the reason a striking attorney assumes the juror is queer. Would "manner of dress" then be an impermissible reason for a strike? Under the *Batson* standard, it would not be, as that would rely on an understanding of bias and pretense that *Batson* simply does not allow for.[130]

Even more troublingly, applying *Batson* could lead to jurors being outed against their wishes,[131] a process that might turn them against the party asking the question or, worse, cause them embarrassment or even physical danger.[132] As Young notes, one alternative could be in camera questioning as a solution to the outing problem.[133] But as she points out, not only will most jurors still feel uncomfortable discussing their sexuality in front of a judge even away from the other jurors, but such questioning also sends the message that queer identities are abnormal or shameful, while some straight and cisgender jurors might be offended at being mistaken as queer.[134]

Batson's failure to address both pretense and implicit bias makes it difficult to apply in a racial context and nearly impossible to apply to invisible identities. In an effort to address the problem

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129. If a mustache is acceptable under the standard, one must assume that a person's manner of dress is also acceptable. *See supra* note 94 and accompanying text. Some courts have so held, allowing strikes based on "baggy" clothing. Jeffrey Bellin & Junichi P. Semitsu, *Widening* Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1091 (2011).

130. For an example of the problem, consider the hypothetical posed in Kathryne Young's article:

> Prosecutor: She doesn't seem gay to me, Your Honor. That didn't even cross my mind.
>
> Defense attorney: Oh, come *on*. Short hair, no wedding ring, baggy jeans, and she plays in two adult softball leagues.
>
> Prosecutor: I didn't look at her jeans. But she's carrying a purse. That doesn't seem very homosexual.
>
> Defense attorney: It's not a purse, it's a messenger bag. Your Honor, whether she's gay or straight, she's a walking stereotype.

Young, *supra* note 19, at 257-58.

131. Unsurprisingly, most jurors prefer not to out themselves; in one study, "more than half of gay and lesbian court users preferred not to" when the issue arose. *Id.* at 256.

132. *Id.* at 258.

133. *Id.* at 259.

134. *Id.*

of racial *Batson* challenges, the Washington Supreme Court has implemented a new system that addresses both of these problems; such a system could be the solution those who wish to protect queer jurors from discriminatory strikes are looking for, without implementing the more drastic and controversial change of abolishing peremptories entirely.

III. WASHINGTON'S NEW RULE

In 2017, Washington held a symposium addressing issues of racial discrimination in the court system.[135] At this symposium, participants heard testimony from a black woman who had been removed from jury duty for no reason that she could understand.[136] The woman, who chose to remain anonymous, explained how the experience had humiliated and degraded her, shaking her faith in the justice system as a whole.[137]

The Washington Supreme Court's evaluation of the symposium and the general history of *Batson* challenges in the state resulted in the court calling on the ACLU and a collection of activist groups to draft a new rule that would expand and replace *Batson*; this rule would address not only explicit racial bias, but also implicit bias and pretense.[138]

A. An Overview of General Rule 37

Washington's General Rule 37 (GR 37) expressly attempts to "eliminate the unfair exclusion of potential jurors based on race or ethnicity."[139] The first part of a GR 37 challenge is nearly identical to a typical *Batson* challenge: the party opposing a peremptory strike (or the court itself) objects to the strike for reason of improper

135. *Washington Supreme Court Is First in Nation to Adopt Rule to Reduce Implicit Racial Bias in Jury Selection*, ACLU (Apr. 9, 2018), https://www.aclu.org/press-releases/washington-supreme-court-first-nation-adopt-rule-reduce-implicit-racial-bias-jury [https://perma.cc/9QPJ-42PU] [hereinafter ACLU].

136. *Id.*

137. *See id.*

138. *Id.*

139. WASH. CT. GEN. R. 37(a).

bias.[140] The party striking must then respond with a neutral reason for the strike.[141] From there, the process is far more rigorous than *Batson*: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court *need not find purposeful discrimination to deny the peremptory challenge.*"[142] The rule goes on to define the "objective observer" as one who "is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State."[143]

Next, the court created an extensive list of situations that might indicate the need for a *Batson* challenge:

> (i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;
> (ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;
> (iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;
> (iv) whether a reason might be disproportionately associated with a race or ethnicity; and
> (v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.[144]

The court went even further, ensuring that discretion of trial judges would not allow for even unconsciously biased rulings on peremptory strikes. In Washington, attorneys can no longer strike jurors for distrusting or having prior contact with law enforcement, living in a high-crime neighborhood, having a child outside of marriage,

140. *Id.* at 37(c).
141. *Id.* at 37(d).
142. *Id.* at 37(e) (emphasis added).
143. *Id.* at 37(f).
144. *Id.* at 37(g).

receiving state benefits, or not being a native English speaker.[145] Under *Batson*, such reasons would have been considered sufficiently neutral to defeat a challenge.[146] To further ensure compliance with the new standard, the court added a list of reasons that were not presumptively invalid by law, but that ought to be treated with suspicion: "allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers" will be accepted as valid only if the juror's behavior is corroborated by the judge or opposing counsel.[147]

This rule contains language that addresses several of the previously discussed issues with *Batson*: (1) it addresses the issue of pretense by identifying facially neutral reasons that have historically been used to strike jurors of color, and deeming them presumptively invalid; (2) it accounts for problems of implicit bias by specifying that no purposeful discrimination is necessary to sustain a *Batson* challenge; and (3) it casts suspicion on the practice of extensively questioning certain classes of jurors who the lawyer assumes (based on stereotypes) will have certain biases.

At the time of this writing, the Washington Supreme Court has not yet grappled with GR 37 and has only held in a single case that it did not apply retroactively.[148] Time will tell if GR 37 challenges actually succeed more often than *Batson* challenges and accomplish the goal of diminishing voir dire bias against jurors of color. Regardless, it provides an interesting framework on which to base legislation that could apply to currently unprotected marginalized groups.

B. How Washington's Rule Could Apply to Queer Jurors

GR 37 addresses biases historically held against people of color, whether explicit or implicit. A rule for strikes based on sexual orientation and gender identity would follow GR 37's example by looking at historical biases against queer people and prohibiting

145. *Id.* at 37(h)(i-vii).

146. *See supra* Part II.A.

147. WASH. CT. GEN. R. 37(h)(i).

148. State v. Jefferson, 429 P.3d 467, 477 (Wash. 2018) ("The question is whether GR 37 nevertheless applies to this case. This is a long analysis, but the answer is no.").

strikes and lines of questioning based on such biases. It would also, as in GR 37, allow a judge to find that a strike was made based on implicit bias, eliminating the need to out jurors in order to preserve their rights.

1. Examples of Presumptively Invalid Reasons

The neutral reason loophole is easy enough to abuse when applied to race and gender, which are readily apparent traits in most cases. When dealing with a less visible trait such as sexuality or gender identity, which relies nearly entirely on judgments based on stereotypes or direct questioning, applying *Batson* would curtail only those attorneys who make the mistake of being open about their discriminatory reasoning.[149]

In creating their list of presumptively invalid reasons, the Washington court relied on factors historically associated with racial stereotypes such as prior police interactions, neighborhoods, and mannerisms.[150] Consider a GR 37 that went beyond race: such a list, when adjusted for stereotypes related to gender expression and sexuality, could include feminine or masculine mannerisms, choice of dress, or haircuts. It could also, as mentioned above, include past experiences with police, with doctors, or with religion.[151] It could, to return to Harvey Milk, include reasons such as walking in a pride parade, or living with a male roommate.[152] Such a list could remove the problem of pretense and, presumably to Justice Blackmun's satisfaction, limit the use of stereotypes as a shortcut in voir dire and force lawyers to dig deeper into whether a juror might be biased.[153] By making the reasons presumptively invalid, the rule also cuts down on the use of neutral reasons that might be relevant to a particular case but are correlated with a specific group.

149. *See* Young, *supra* note 19, at 269. *See generally* Bellin & Semitsu, *supra* note 129.
150. *See* ACLU, *supra* note 135.
151. *See supra* text accompanying notes 118-25.
152. *See supra* notes 4-8 and accompanying text.
153. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 138-40 (1994).

2. Lines of Questioning

Consider the *SmithKline* case.[154] There, the attorney, instead of striking the juror just after learning about his male partner, began an intense line of questioning. Do you know anyone with HIV? Do you know what medications those people take?[155] These suspicious questions would be perfectly permissible under *Batson*, but under GR 37, would provide a cue for the court or the opposing party to raise an objection and examine the lawyer's motivations for evidence of prejudice.[156]

This also applies if the lawyer asked these questions across the board. Assume the juror in question answered affirmatively to knowing someone affected by HIV/AIDS, but the lawyer, instead of singling him out, then asked every other juror the same question. If no other jurors answered affirmatively, maybe there would be a legitimate reason for the strike. But if another juror said "yes, I know someone with AIDS," and the lawyer chose to use his strike only on the gay juror, GR 37 would require the opposing attorney or the court itself to object.[157]

3. Implicit Bias

Implicit bias, when applied to queer people, is difficult to define. Different kinds of implicit bias exist; for some queer people, clues about their identity are often visible, but this may not result in explicit bias. Take the following example. An attorney speaks to a gay woman during voir dire. The woman exhibits more stereotypically masculine traits in both her manner of dress and conversation. The attorney might not immediately, consciously think, "I think she's a lesbian, so now I think X about her." However, the attorney might recognize those traits and, on a subconscious level, begin associating the woman with all the stereotypes lesbians are associated with. That is what makes the issue different from the issue of racial bias: the attorney does not even need to know (or

154. SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014).
155. *Id.* at 474-75.
156. *See supra* text accompanying note 144.
157. *See supra* text accompanying note 144.

think they know) the juror's gender identity or sexuality to begin making assumptions.

There is still, of course, the usual implicit bias problem. In *SmithKline*, the struck juror's same-sex partner came up during voir dire.[158] Even if a lawyer made no conscious decisions based on this, the lawyer might then view the juror's answers in a different light, or ask more questions based on some sort of "hunch."

Because of situations such as this, the implicit bias question is addressed by the GR 37 provision that no intentional discrimination is necessary.[159] The first problem—implicit bias based on stereotyping rather than direct knowledge—is deterred by the list of presumptively invalid reasons to strike in combination with the lack of an intentional discrimination requirement.[160] The second problem—knowledge leading to unconscious suspicion—is deterred by the limitations on individual questioning in combination with that same intentional discrimination provision.[161]

IV. OBJECTIONS

A. The Issues with a Legislative Approach

The advantage of *Batson*, of course, is that it is embedded in the Constitution,[162] and any Supreme Court ruling expanding *Batson* would apply nationwide. A state-by-state legislative approach will result in slow, fragmented progress; and, because such protections would likely come out of states already willing to protect the rights of queer citizens, the states where attitudes toward queer people are most biased—and thus, where such protections would be most necessary—are unlikely to take such action. This is why *Obergefell*[163] mattered, even though same-sex marriage advocates were gaining ground in the states.[164]

158. *SmithKline*, 740 F.3d at 474.
159. WASH. CT. GEN. R. 37(e)-(f).
160. *Id.* at 37(e)-(g).
161. *Id.*
162. *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).
163. Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the Fourteenth Amendment requires states to provide marriage licenses to same-sex couples).
164. *Id.* at 2597.

Unfortunately, the Supreme Court has failed to change the *Batson* challenge's structure, even in the face of its empirical failure to address the discriminatory use of peremptories.[165] This might be due to the concerns over limiting the peremptory rule, as discussed below,[166] or might simply be a reluctance to tackle the issue again. Regardless, even if the Court did decide to change the *Batson* framework, it would also need to (1) change the scrutiny standard for gender identity and sexuality classifications to strict (or at least intermediate) scrutiny, and (2) rule that *Batson* applies to those classifications as well.[167] With all of those preconditions, a slow, fragmented legislative approach might actually bring quicker results.

Additionally, it is unlikely that a decision would come up with rules as specific as the language of GR 37. Constitutional standards are malleable and subject to interpretation—and therefore subject to clever circumvention.[168] A statute could provide workable, precise rules for lawyers and judges, and avoid the issues involved in *Batson*'s "neutral reason" test.

To be clear, this Note does not argue *against* adopting the *Batson* standard for queer jurors. It simply suggests that such a change would not be enough to guard against the kinds of bias that deny queer people equal access to the jury box. And if GR 37 seems like a radical and unreachable goal, the reactions of various Washington groups might provide some insight to the contrary.

Unsurprisingly, the Washington ACLU—one of the original drafters of the new rule, along with the Legal Voice, the Loren Miller Bar Association, the Latino/a Bar Association of Washington, and the Korematsu Center for Law and Equality at Seattle University School of Law—considered it a victory.[169] A senior staff attorney for Washington's ACLU touted the rule as a "groundbreaking" move toward promoting the integrity of the judicial system and reducing damage done to communities of color who had been unfairly excluded in the past.[170] More notably, Washington Attorney General

165. *See supra* Part II.A.3.
166. *See infra* Part IV.B.
167. *See supra* notes 20-21 and accompanying text.
168. *See supra* note 92 and accompanying text.
169. *See* ACLU, *supra* note 135.
170. *Id.*

Bob Ferguson also spoke highly of the change, saying, "This is a significant and overdue step that will help ensure juries represent the communities they serve."[171] The Washington Association of Criminal Defense Lawyers joined in the praise, and in fact aided in drafting the rule.[172] Seeing a positive reaction from a civil rights advocacy group such as the ACLU is no surprise, but seeing positivity from groups who will be directly affected—and in some cases, limited—by the rule speaks to an understanding in the community that something needs to change.

B. The Dangers of Taking the Teeth Out of the Peremptory Rule

Because GR 37 is so recent, there has been almost no discussion of its implications for the use of the peremptory rule in Washington generally. But the argument is not difficult to predict. The list of factors that are presumptively invalid under the new law is an extensive one,[173] and expanding such a rule to gender and sexuality biases might result in a list of factors so long that peremptory challenges would nearly always be subject to an objection.

Some would argue that this would effectively eliminate the peremptory rule, which would be a hindrance to attorneys who use it to try to provide their clients with a fair trial. But consider the opposite view: the peremptory rule itself is so easy to abuse that if it must remain a part of voir dire, it must also be subject to strict limits to ensure it is not used to inappropriately discriminate against marginalized groups.[174] In other words, if muzzling the peremptory challenge is what is necessary to restore faith in the justice system,[175] ensure equal participation in the jury box,[176] and create more diverse and thoughtful juries to decide disputes that

171. Sydney Brownstone, *Washington Courts Now Have the Country's First Rule for Tackling Implicit Bias in Jury Selection*, STRANGER (Apr. 10, 2018, 2:55 PM), https://www.thestranger.com/slog/2018/04/10/26024644/washington-courts-now-have-the-countrys-first-rule-for-tackling-implicit-bias-in-jury-selection [https://perma.cc/EXN6-XGD5].

172. *See* ACLU, *supra* note 135.

173. *See supra* text accompanying note 144.

174. Hoffman, *supra* note 25, at 871.

175. *See supra* note 62 and accompanying text.

176. *See supra* notes 81-86 and accompanying text.

may end in the destruction of liberty or property,[177] then courts have a responsibility to do so. Additionally, a long list of factors is not an infinite list. Lawyers would still be free to exercise peremptory strikes based on answers to voir dire questions, a juror's occupation, or other innocuous traits. They would just find it harder to make up a nondiscriminatory reason when the purpose was, in fact, discriminatory, whether they knew it or not.

CONCLUSION

While an expansion of *Batson* would certainly be a victory for those advocating for protections for queer jurors, much like *Obergefell* was for advocates of same-sex marriage, it would not be the end of the fight. Discrimination against queer people is far-reaching, and can rely on insidious and unconscious biases that can result as easily from masculine or feminine presentation as from explicit knowledge of a same-gender partnership.[178] *Batson* is unable to fully combat those biases. It allows for facially neutral observations, such as manner of speech or dress or past interactions with police, to serve as scapegoats for peremptory strikes actually motivated by animus and stereotyping.[179] To truly ensure that peremptory strikes comply with equal protection, something beyond *Batson* is necessary. Washington's General Rule 37 is a good example of a potential legislative solution to the problem: by providing examples of presumptively invalid "neutral reasons" for peremptory strikes, it curbs attempts to circumvent the *Batson* rule with pretense.[180] Those same presumptively invalid reasons guard against overuse of neutral reasons basing the strike on traits more often found in queer people. And by allowing *Batson* challenges to succeed even when a judge finds no evidence of deliberate discrimination, Washington's rule introduces implicit bias to the *Batson* analysis for the first time.

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177. As mentioned above, diverse juries make better decisions; having a more thoughtful and thorough analysis is essential to the justice system. *See supra* note 74 and accompanying text. Unless, of course, you are deliberately attempting to undermine it. *See Training Video*, *supra* note 28.

178. *See supra* Part II.

179. *See supra* note 129 and accompanying text.

180. *See supra* Part III.B.

Systemic exclusion of queer people from juries erases a valuable perspective in the distribution of justice in both civil and criminal cases, and erodes public faith in the jury system as a whole. The White Night Riots of 1979 demonstrate what that loss of faith meant to the queer community of San Francisco. Building on *Batson*'s protections with clear rules will help change perceptions of the jury and ensure that all citizens have the same chance to deliver justice.

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